APPENDIX

United States Court of Appeals,
Sixth Circuit.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY; Louanne Walker; David Howe; Sarah Doe and Thomas Doe, on behalf of themselves and their minor child, Jane Doe; Lawrence Durham; Paul Lee, Plaintiffs-Appellees,

v.

McCREARY COUNTY, KENTUCKY; Pulaski County, Kentucky, Defendants-Appellants.

No. 08-6069.

Argued: Oct. 20, 2009.

Decided and Filed: June 9, 2010.
Rehearing and Rehearing En Banc Denied July 29, 2010.

Before: RYAN, CLAY, and GIBBONS, Circuit Judges.

CLAY, J., delivered the opinion of the court. GIBBONS, J. (pp. 451-52), delivered a separate concurring opinion. RYAN, J. (p. 452), delivered a separate dissenting opinion.

OPINION

CLAY, Circuit Judge.

Defendants, McCreary County, Kentucky, Pulaski County, Kentucky, and officials from these counties, appeal from the district court order granting Plaintiffs' motion to alter or amend judgment, granting a permanent injunction prohibiting Defendants from displaying the three contested Ten Commandments displays, and construing Defendants' renewed motion for summary judgment as one for relief from final judgment. For the reasons set forth below, we AFFIRM the district court's order.

BACKGROUND

In 1999, McCreary County and Pulaski County, Kentucky erected displays consisting of framed copies of the Ten Commandments in their county courthouses.[1] In response, Plaintiffs

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[1] In addition, Harlan County, Kentucky erected displays of the Ten Commandments in the classrooms of its schools. However, the classroom displays are no longer at issue in this case. For a full recitation of the facts and history of this litigation, see *ACLU of Ky. v. McCreary County, Ky.*, 145 F.Supp.2d 845

filed lawsuits, seeking preliminary injunctions that would require the removal of the displays based on violations of the Establishment Clause of the First Amendment.[2]

Shortly after the complaint was filed and prior to a ruling in the district court on Plaintiffs' request for a preliminary injunction, Defendants altered their displays "in an attempt to bring the display[s] within the parameters of the First Amendment and to insulate themselves from suit." *ACLU of Ky. v. McCreary County, Ky.*, 96 F.Supp.2d 679, 684 (E.D.Ky.2000) (" *McCreary I* "). The second set of displays posted in the courthouses included large copies of the Ten Commandments along with smaller copies of eight other documents, which were religious in nature.

Specifically, the Courthouse displays were modified to consist of: (1) an excerpt from the

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(E.D.Ky.2001) (" *McCreary II* "), *aff'd*, 354 F.3d 438 (6th Cir.2003) (" *McCreary III* "), *aff'd*, 545 U.S. 844, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) (" *McCreary IV* ").

[2] Plaintiffs initially filed three lawsuits, but they were consolidated and treated as one by the district court and this Court on the initial appeal. We continue to treat them as one lawsuit for purposes of this appeal.

Declaration of Independence; (2) the Preamble to the Constitution of Kentucky; (3) the national motto of "In God We Trust"; (4) a page from the Congressional Record of Wednesday, February 2, 1983, Vol. 129, No. 8, declaring it the Year of the Bible and including a copy of the Ten Commandments; (5) a proclamation by President Abraham Lincoln designating April 30, 1863 a National Day of Prayer and Humiliation; (6) an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible" reading, "The Bible is the best gift God has ever given to man."; (7) a proclamation by President Ronald Reagan marking 1983 the Year of the Bible; and (8) the Mayflower Compact. *McCreary III,* 354 F.3d at 442. Defendants also passed new resolutions authorizing the second set of displays ("the 1999 resolutions"), which emphasized the importance of religion in historical documents of the United States and encouraged the County Judge Executive to "post the Ten Commandments as the precedent legal code upon which the civil and criminal codes of the Commonwealth of Kentucky are founded." (Dist. Ct. R.E. 119 Ex. B). On May 5, 2000, the district court granted Plaintiffs' motion for a preliminary injunction, ordering that Defendants remove the second displays "immediately" and not erect "similar displays" in the future. *McCreary I,* 96 F.Supp.2d at 691.

In response to the district court's ruling, the counties removed the second set of displays, voluntarily dismissed an appeal from the initial preliminary injunction, and posted a third set of displays entitled the Foundations of Law and Government Displays ("Foundations Displays"). The third displays contained nine documents of equal size, including the Ten Commandments, along with one page of explanatory phrases to accompany each of the nine other documents. Specifically,

> [t]he new courthouse displays consisted of the entire Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Preamble to the Kentucky Constitution, the Ten Commandments, Lady Justice and a one-page prefatory document entitled "The Foundations of American Law and Government Display." ... The prefatory description states that the "display contains documents that played a significant role in the foundation of our system of law and government." ... With regard to the Ten Commandments, the prefatory description states:
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> > The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the

> Declaration of Independence, which declared that, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.
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> There is no other discussion of the Ten Commandments and how it purportedly relates to any of the other documents in the display.

McCreary III, 354 F.3d at 443. At the time the Foundations Displays were erected, the counties did not repeal the 1999 resolutions, which were passed just months earlier, or pass new resolutions authorizing the third displays. On June 22, 2001, the district court granted Plaintiffs' motion for a supplemental preliminary injunction to include the third displays. On December 18, 2003, this Court affirmed.

On October 12, 2004, the Supreme Court granted Defendants' petition for certiorari.[3] On

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[3] Defendants sought certiorari on the following issues:

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1. Whether the Establishment Clause is violated by a privately donated display on government property that includes eleven equal size frames containing an explanation of the display along with nine historical documents and symbols that played a role in the development of American law and government where only one of the framed documents is the Ten Commandments and the remaining documents and symbols are secular.

2. Whether a prior display by the government in a courthouse containing the Ten Commandments that was enjoined by a court permanently taints and thereby precludes any future display by the same government when the subsequent display articulates a secular purpose and where the Ten Commandments is a minority among numerous other secular historical documents and symbols.

3. Whether the Lemon test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence.

4. Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion.

March 8 and March 10, 2005, after oral argument but before the Supreme Court issued a decision, the counties passed new resolutions ("the 2005 resolutions"), which repealed and repudiated the 1999 resolutions authorizing the second displays. On June 27, 2005, the Supreme Court upheld the preliminary injunction on the basis that Defendants exhibited an unconstitutional religious purpose in posting the Foundations Displays. The Supreme Court viewed the repeal of the 1999 resolutions as "acts of obviously minimal significance in the evolution of the evidence." *McCreary IV,* 545 U.S. at 872 n. 19.

After the Supreme Court issued its opinion, the case returned to the district court for further proceedings. The district court entered a scheduling order containing, among other things, discovery and dispositive motion deadlines. After discovery closed, both sides submitted motions for summary judgment. Between the Supreme Court decision in June of 2005 and the filing of the motions for summary judgment in January and February of 2007, the parties merely conducted discovery as to the factual details and motivation for the sequence of the displays. Defendants made no changes to the Foundation Displays, nor did they pass any

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Petition for Writ of Certiorari, *McCreary IV,* 2004 WL 1427470, at *i (June 21, 2004).

new resolutions concerning the purpose of the displays.

On September 28, 2007, the district court denied both Plaintiffs' and Defendants' motions for summary judgment. In denying Plaintiffs' motion for a permanent injunction against the Foundation Displays, the district court held that the constitutional violation is not "continuing" as required by the standard for a permanent injunction because "it is possible to purge the taint of the impermissible religious purpose." (Dist. Ct. R.E. 153 at 10). However, the district court also denied Defendants' motion for summary judgment, holding that the counties had not taken any actions since the Supreme Court decision that showed a change in their predominantly religious purpose; thus, Defendants' actions in posting the Foundations Displays continued to violate the Establishment Clause. Despite the district court's holding that neither Plaintiffs nor Defendants were entitled to judgment as a matter of law, the court also found that no triable issues of fact remained and referred the case to the magistrate judge for a settlement conference.

On October 9, 2007, in response to the district court's finding that Defendants continued to violate the Establishment Clause, Defendants enacted new resolutions regarding

the Foundations Displays ("the 2007 resolutions"). The 2007 resolutions stated the educational and historical purpose of the Foundations Displays and expressly disclaimed any attempt to endorse religion. On October 15, 2007, Plaintiffs filed a timely motion under Federal Rules of Civil Procedure 59 and 60 to alter or amend the court's September 28, 2007 judgment denying Plaintiffs' motion for summary judgment. On October 30, 2007, Defendants filed a renewed motion for summary judgment in light of the 2007 resolutions. Plaintiffs moved to strike Defendants' renewed motion on November 19, 2007, because Defendants had filed the motion more than one year after the dispositive motion deadline and had attempted to admit new evidence more than one year after the close of discovery.

On August 4, 2008, the district court: (1) granted Plaintiffs' motion to alter or amend judgment, (2) denied Plaintiffs' motion to strike Defendants' motion for summary judgment and directed Plaintiffs to file a response, and (3) construed Defendants' motion for summary judgment as one of relief from final judgment. In altering its judgment under Rule 59(e), the district court declared the Foundation Displays unconstitutional and permanently enjoined Defendants from displaying all three displays in the county courthouses based on the court's

finding that the Foundations Displays continued to violate the Establishment Clause as of its September 28, 2007 order. The district court also ruled that its order was final and appealable. On September 2, 2008, Defendants filed their timely notice of appeal from the district court's final judgment. On September 30, 2008, the district court dismissed without prejudice what it deemed to be Defendants' motion for relief from judgment on the ground that the court had lost jurisdiction over the motion when Defendants filed their appeal. Defendants filed no notice of appeal from the district court's denial of their relief from judgment.

DISCUSSION

I. Permanent Injunction Standard

This appeal differs from the last time we heard this case in that we are reviewing the district court's grant of a permanent injunction rather than a preliminary injunction.

In evaluating a district court's grant of a permanent injunction, we review its factual findings under a clearly erroneous standard, its legal conclusions de novo, and the scope of injunctive relief under an abuse of discretion standard. *Women's Med. Prof'l Corp. v. Baird,* 438 F.3d 595, 602 (6th Cir.2006).

In general, "[t]he standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that [for a preliminary injunction] the plaintiff must show a likelihood of success on the merits rather than actual success." *Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 546 n. 12, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987) (internal citations omitted). In the context of this case, "a party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer 'continuing irreparable injury' for which there is no adequate remedy at law." *Baird,* 438 F.3d at 602 (citing *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1067 (6th Cir.1998)).

II. Disposition of Permanent Injunction

As was true the last time we heard this matter, the governing standard for determining whether a particular government action violates the Establishment Clause remains *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Despite Defendants' attempts to persuade the Supreme Court to abandon the inquiry into legislative purpose, the Supreme Court confirmed that the Lemon test remains the appropriate inquiry. *See McCreary IV,* 545 U.S. at 861-64, 125 S.Ct. 2722. Under the *Lemon* test, as originally

formulated, reviewing courts must consider whether (1) the government activity in question has a secular purpose, (2) the activity's primary effect advances or inhibits religion, and (3) the governmental activity fosters an excessive entanglement with religion. *Lemon,* 403 U.S. at 612-13, 91 S.Ct. 2105.

The touchstone of a reviewing court's analysis under the Establishment Clause requires "government neutrality between religion and religion, and between religion and nonreligion." *McCreary IV,* 545 U.S. at 860, 125 S.Ct. 2722 (quoting *Epperson v. Arkansas,* 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968)).

In analyzing purpose under the first prong of the *Lemon* test, "[t]he eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *Id.* at 862, 125 S.Ct. 2722 (quoting *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 308, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (quoting *Wallace v. Jaffree,* 472 U.S. 38, 76, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985))). See also *Edwards v. Aguillard,* 482 U.S. 578, 594-95, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987). "[A]lthough a legislature's stated reasons will generally get deference, the

secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary IV,* 545 U.S. at 864, 125 S.Ct. 2722. Thus, the government violates the Establishment Clause when it acts with the "predominant purpose of advancing religion." *Id.* at 860, 125 S.Ct. 2722.

Furthermore, the objective observer is considered to have "reasonable memories," and Supreme Court precedents "sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.' " *Id.* at 866, 125 S.Ct. 2722 (quoting *Santa Fe,* 530 U.S. at 315, 120 S.Ct. 2266). Thus, reviewing courts must look with the eye of an observer "familiar with the history of the government's actions and competent to learn was history has to show." *Id.* (citing *Santa Fe,* 530 U.S. at 308, 120 S.Ct. 2266). As a consequence, "the same governmental action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage." *Id.* at 866 n. 14, 125 S.Ct. 2722 ("where one display has a history manifesting sectarian purpose that the other lacks, it is appropriate that they be treated differently, for the one display will be properly understood as demonstrating a preference for one group of religious believers as against another").

As an initial matter, given that

Defendants' brief challenges only the permanent injunction against the Foundations Display, we affirm the permanent injunction as to the first and second displays. We further find that the district court did not err in permanently enjoining the Foundations Displays based on its finding that Defendants' actions in posting these displays continued to violate the Establishment Clause as of its September 28, 2007 order.

The district court properly found that no facts affecting the purpose analysis had changed between the Supreme Court decision finding an improper religious purpose in June of 2005 and the filing of the motions for summary judgment on remand in January and February of 2007. In that time, Defendants made no changes to the content or context of the Foundation Displays, nor did they pass any new resolutions concerning the purpose of the displays. The Supreme Court found the content of the Foundation Displays, in conjunction the evolution of evidence, to reveal Defendants' religious purpose in posting the displays. According to the Court, the puzzling choices that the counties made concerning which documents to include in the displays and which documents to omit would probably lead an objective observer to "suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses

constitutionally required to embody religious neutrality." *McCreary IV,* 545 U.S. at 873, 125 S.Ct. 2722.[4] Likewise, on remand, the "objective

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[4] According to the Supreme Court:

> the selection of posted material [does not] suggest a clear theme that might prevail over evidence of the continuing religious object. In a collection of documents said to be "foundational" to American government, it is at least odd to include a patriotic anthem, but to omit the Fourteenth Amendment, the most significant structural provision adopted since the original Framing. And it is no less baffling to leave out the original Constitution of 1787 while quoting the 1215 Magna Carta even to the point of its declaration that "fish-weirs shall be removed from the Thames." *Id.*, at 205a, ¶ 33. If an observer found these choices and omissions perplexing in isolation, he would be puzzled for a different reason when he read the Declaration of Independence seeking confirmation for the Counties' posted explanation that the Ten Commandments' "influence is clearly seen in the Declaration," *id.*, at 180a; in fact the observer would find that the Commandments are sanctioned as divine imperatives, while the Declaration of Independence holds that the authority of government to enforce the law derives "from the consent of the governed," *id.*, at 190a.

observer" who has reasonable memories would have seen the same Foundations Displays posted in the courthouses with the same set of resolutions authorizing the displays, and would have instantly recognized the same religious purpose that Defendants articulated during the previous round of litigation. *See also Santa Fe,* 530 U.S. at 315, 120 S.Ct. 2266 (holding that a school district's history of non-compliance with the Establishment Clause must be considered in determining whether the school district's latest iteration of the challenged policy was constitutional).

Defendants attempt to argue that because the 2005 resolutions, which adopted educational purposes for the Foundations Displays and repealed the 1999 resolutions containing explicit religious purpose statements, were passed after the Supreme Court heard oral arguments, the Supreme Court did not have a chance to adequately consider the context of the 2005 resolutions or their effect in eradicating the improper religious purpose. However, despite the fact that the counties passed these resolutions after briefing and oral argument, the Supreme Court still considered them in deciding that the counties had not eliminated the improper

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McCreary IV, 545 U.S. at 872-73, 125 S.Ct. 2722.

religious purpose. In the context of the overall evolution of the displays, the Supreme Court found that the counties' new unwritten statements of purpose "were presented only as a litigating position" and that the new 2005 written resolutions were "acts of obviously minimal significance in the evolution of the evidence." *McCreary IV,* 545 U.S. at 871, 872 n. 19, 125 S.Ct. 2722. *See also Adland v. Russ,* 307 F.3d 471, 481 (6th Cir.2002) (finding that Kentucky's clarification of its Ten Commandments display only after it was in the midst of litigation was probative of the Commonwealth's religious purpose).

In support of their argument that the 2005 resolutions evince a secular purpose, Defendants argue that the Supreme Court merely mentioned the 2005 resolutions in a footnote and that a reviewing court should generally defer to a legislature's stated intent unless it is determined to be a "sham." But Defendants have failed to show why the district court should have attributed more significance to the 2005 resolutions than did the Supreme Court in determining the purpose of the displays. The Supreme Court considered the 2005 resolutions when the Court made its decision, and the Supreme Court's assessment of the 2005 resolutions became the law of the case, which we are obligated to follow. *See Niemi v. NHK Spring Co., Ltd.,* 543 F.3d 294,

308 (6th Cir.2008) (citing *Scott v. Churchill,* 377 F.3d 565, 569 (6th Cir.2004); *Rouse v. DaimlerChrysler Corp. UAW,* 300 F.3d 711, 715 (6th Cir.2002)) ("[u]nder the law-of-the-case doctrine, rulings made at one point in the litigation should continue to govern in subsequent stages of that litigation").

The district court was in no position on remand to assume that the Supreme Court did not do its job and did not afford the resolutions the proper weight. The district court was correct to take its direction from the Supreme Court, not from Defendants' bare assertion that the 2005 resolutions eradicated the improper religious purpose. Lower courts are "obligated to follow Supreme Court dicta, particularly where there is not substantial reason for disregarding it, such as age or subsequent statements undermining its rationale." *United States v. Marlow,* 278 F.3d 581, 588 n. 7 (6th Cir.2002) (citing *Gaylor v. United States,* 74 F.3d 214, 217 (10th Cir.1996) ("this court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and *448 not enfeebled by later statements"); *McCoy v. Mass. Inst. of Tech.,* 950 F.2d 13, 19 (1st Cir.1991) ("federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings ...")).

Although the Supreme Court made clear that the counties' past actions do not "forever taint any effort on their part to deal with the subject matter," *McCreary IV*, at 874, 125 S.Ct. 2722, Defendants offered no new facts on remand that show that their purpose had changed from the one that the Supreme Court found to violate the Establishment Clause. The four changes cited by Defendants are not "genuine changes in constitutionally significant conditions." *Id.* First, Defendants' distinction between the content of the second and third displays does not govern whether the legislators had an improper purpose in hanging the displays and, in any event, those distinctions existed before the Supreme Court issued its decision. Second, the fact that more time has passed since the Supreme Court decision is meaningless in this case, because Defendants have spent the time since the Supreme Court decision continuously seeking to accomplish their initial purpose of posting the Ten Commandments as a religious document. Unlike a case in which the passage of time might have some significance, there has been no dormant period here; Defendants have continuously sought to defend their actions and accomplish what they initially set out to do. Third, the change in government personnel is irrelevant, because the "objective observer" test does not encompass "judicial psychoanalysis of

a drafter's heart of hearts." *Id.* at 862, 125 S.Ct. 2722. Finally, the two sets of "new" government resolutions are not new: the 2005 resolutions were enacted before the Supreme Court's decision and deemed of minimal significance by the Court, and the 2007 resolutions were passed more than a year after the close of discovery in response to the district court's finding that the posting of the Foundations Displays continued to violate the Establishment Clause. Thus, the district court properly found that no facts changed on remand that would affect the Supreme Court's analysis.

Furthermore, even if this Court were to consider the 2007 resolutions, which were adopted after and in direct response to the district court's finding that Defendants continued to advance a religious purpose and more than a year after the close of discovery, it is clear that these resolutions, like the previous statements of purpose, were adopted only as a litigating position. These resolutions represent Defendants' latest effort in a long line of attempts to conform their conduct to the requirements of the Constitution after adverse court rulings. *See Santa Fe,* 530 U.S. at 315, 120 S.Ct. 2266 (noting that the case at issue was "the latest step in developing litigation" and "refus [ing] to turn a blind eye to the context in which [the policy of prayer at football

games] arose" in finding that "this policy was implemented with the purpose of endorsing [religion]"). Thus, like the 2005 resolutions, the 2007 resolutions provide little evidence that Defendant's actual purpose has changed and are of minimal significance in light of the evolution of the evidence. *See McCreary IV,* 545 U.S. at 872 n. 19, 125 S.Ct. 2722.

The fact that this Court has found since the Supreme Court decided *McCreary* that two counties did not have an impermissible religious purpose in posting displays identical to the Foundations Displays at issue does not affect our finding that the counties in this case have still not presented a valid secular purpose. *See ACLU of Ky. v. Grayson County, Ky.,* 591 F.3d 837 (6th Cir.2010); *ACLU of Ky. v. Mercer County, Ky.,* 432 F.3d 624 (6th Cir.2005). The Supreme Court in *McCreary* noted that "the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage." *McCreary IV,* 545 U.S. at 866 n. 14, 125 S.Ct. 2722. Unlike the extended history of sectarian purpose here, in Mercer "there was only one display, one authorizing measure, and one implementation, all of which demonstrate a secular purpose." 432 F.3d at 631. Likewise, the majority in *Grayson* characterized the history of the display as evidencing a predominantly secular purpose. *See Grayson,* 591 F.3d at 849

("As in Mercer County, the approval of the display in Grayson County was not attended by a history evidencing a predominantly religious purpose. There were no earlier displays nor were there any earlier resolutions indicating an avowedly religious purpose."). While there is significant evidence in the Grayson record that Defendants' predominant purpose, as observed by an objective observer, was to post the Ten Commandments as a religious text, we are bound to interpret *Grayson* in a manner that does not conflict with the Supreme Court's decision in *McCreary*.[5] Thus, given the lack of

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[5] However, we also note that the *Mercer* and *Grayson* opinions essentially ignore the Supreme Court's reliance in *McCreary* on both the content of the display and the evolution of the evidence in determining that Defendants had a religious purpose in posting the Foundations Display. The *Mercer* and *Grayson* panels would have us believe that the Supreme Court approved of the content of the Foundations Displays and relied exclusively on the existence of prior displays and past conduct of McCreary County officials in rejecting Defendants' stated purpose as a sham. In fact, the Supreme Court in *McCreary* noted that the puzzling choices that the counties made concerning the content of the Foundations Displays would probably lead an objective observer to "suspect that the Counties were

the same type of extended sectarian history in *Mercer* and *Grayson,* these cases are distinguishable from the instant case. Further, unlike in *Grayson* and *Mercer,* the Supreme Court in *McCreary* has definitively found that the display at issue violates the Establishment Clause, and we are obligated to follow that precedent if no constitutionally significant facts have changed.

Because the Supreme Court found that Defendants acted with the predominant purpose of advancing religion in displaying each of their three Ten Commandment displays in the county courthouses and Defendants continued to exhibit the same purpose when the district court issued its September 28, 2007 order, Defendants' action in posting these displays violated the Establishment Clause. Thus, Plaintiffs have established that they suffered a constitutional violation and will suffer continuing irreparable injury if the violation continues. The fact that Defendants seek to minimize the residue of religious purpose does not mean that Plaintiffs do not suffer continuing irreparable injury so long as

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simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality." *McCreary IV*, 545 U.S. at 873, 125 S.Ct. 2722.

the display remains on the walls of the county courthouses. Thus, there is no adequate remedy at law, and Plaintiffs have demonstrated that they are entitled to a permanent injunction.

Accordingly, the district court erred in declining to enter a permanent injunction against Defendants in its September 28, 2007 order after finding that Defendants had violated the Establishment Clause. However, the district court rectified that error by properly enjoining Defendants from posting the displays in its August 4, 2008 order.

III. Disposition of Procedural Claims

A. Plaintiffs' Motion to Amend or Alter Judgment

1. Standard of Review

Although we generally review a grant or denial of a motion to alter or amend a judgment under Rule 59(e) for abuse of discretion, when the Rule 59(e) motion seeks review of a grant of summary judgment, we apply a de novo standard of review. *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1047 (6th Cir.2001). In granting Plaintiffs' Rule 59(e) motion, the district court essentially reconsidered and granted summary judgment in favor of Plaintiffs. Accordingly, we apply a de novo

standard of review.

"A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment." Fed.R.Civ.P. Rule 59(e) (emphasis added). A court may grant a motion to alter or amend judgment only if there was "(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Intera Corp. v. Henderson,* 428 F.3d 605, 620 (6th Cir.2005) (citing *GenCorp, Inc. v. Am. Int'l Underwriters,* 178 F.3d 804, 834 (6th Cir.1999)).

2. Analysis

Because the district court erroneously denied Plaintiffs' summary judgment motions after finding that Defendants continued to violate the Establishment Clause and that no triable issues of fact remained, the district court had not yet entered judgment when it granted Plaintiffs' motion to alter or amend judgment. Thus, Plaintiffs' motion was effectively a motion for reconsideration of summary judgment and "[t]he district court was therefore free to reconsider or reverse its decision for any reason." *Cameron v. Ohio,* 344 Fed.Appx. 115, 118 (6th Cir.2009) (citing *Russell v. GTE Gov't Sys. Corp.,* 141 Fed.Appx. 429, 436 (6th Cir.2005)). However, this Court has also found

that it may be "proper for the [d]istrict [c]ourt to entertain a motion to alter or amend a judgment under Rule 59(e) even though it was filed prior to the actual entry of judgment." *Smith v. Hudson,* 600 F.2d 60, 62 (6th Cir.1979). Under the stricter Rule 59(e) standard, Plaintiffs were entitled to have the judgment altered in view of the district court's clear error of law in declining to enter a permanent injunction in its September 28, 2007 order.

Thus, regardless of whether Plaintiffs' motion should have been classified under Rule 59(e) or Rule 54(b), the district court did not err in reconsidering its earlier decision and determining that Plaintiffs were entitled to a permanent injunction.

B. Defendant's Renewed Motion for Summary Judgment

1. Standard of Review

We generally review a district court's denial of a motion for relief from judgment pursuant to Rule 60(b) only for an abuse of discretion. *Massi v. Walgreen Co.,* 337 Fed.Appx. 542, 545 (6th Cir.2009) (citing *Davis v. Jellico Cmty. Hosp., Inc.,* 912 F.2d 129, 133 (6th Cir.1990)). When this Court reviews for abuse of discretion, it will reverse only when it

"is firmly convinced that a mistake has been made." *Bush v. Rauch,* 38 F.3d 842, 848 (6th Cir.1994) (internal citations omitted).

To overcome this deferential standard of review over a motion for relief from judgment, a party must demonstrate that the district court committed "a clear error of judgment, such as applying the incorrect legal standard, misapplying the correct legal standard, or relying upon clearly erroneous findings of fact." *In re Ferro Corp. Derivative Litig.*, 511 F.3d 611, 623 (6th Cir.2008).

2. Analysis

Because the district court entered judgment in the same decision that it construed Defendants' renewed motion for summary judgment as one for relief from judgment under Rule 60(b), it was reasonable for the district court to construe the entry of judgment as coming before the conversion of Defendants' motion.

Furthermore, a district court has broad discretion to manage its docket. *Reed v. Rhodes,* 179 F.3d 453, 471 (6th Cir.1999). A district court's decision whether a late filing results from "excusable neglect" is subject to review for abuse of discretion. *Allen v. Murph,* 194 F.3d 722, 723-24 (6th Cir.1999).

Defendants filed their renewed motion for summary judgment more than one year after the deadline for dispositive motions had passed without seeking leave to file. Defendants sought to introduce new facts–the 2007 resolutions that were passed after and in response to the district court's summary judgment decision–more than one year after the close of discovery. Accordingly, based on the district court's power to manage its own docket, the court had ample discretion to strike Defendants' late renewed motion for summary judgment. By converting Defendants' renewed summary judgment motion to a Rule 60(b) motion for relief from judgment and considering Defendants' new facts and arguments, the district court was giving Defendants the benefit of the doubt.

Finally, we decline to review the district court's subsequent denial of Defendants' motion for relief from final judgment because we lack jurisdiction. Defendants filed their notice of appeal on September 2, 2008 from the district court's order of August 4, 2008, in which it converted Defendants' motion. The district court did not deny Defendants' Rule 60(b) motion until September 30, 2008. Thus, this order denying relief from judgment was not and could not have been appealed pursuant to Defendants' September 2, 2008 notice of appeal. After the district court's September 30,

2008 denial of relief from judgment, Defendants had 30 days under Fed. R.App. P. 4(a)(1)(A) to file a notice of appeal of that order. However, Defendants failed to do so. This failure deprives this Court of jurisdiction over Defendants' attempt to appeal from the September 30, 2008 order.

CONCLUSION

For the reasons set forth above, we AFFIRM the district court's order permanently enjoining Defendants from erecting each of their three Ten Commandment displays in the McCreary County and Pulaski County courthouses.

CONCURRENCE

JULIA SMITH GIBBONS, Circuit Judge, concurring.

I concur with the majority opinion's thoughtful resolution of the constitutional issues surrounding the 2005 Resolutions and its conclusions on the procedural issues in this case but write to emphasize one point. Given that we lack jurisdiction to consider the counties' appeal from the district court's denial of their motion for relief from judgment under Federal Rule of Civil Procedure 60(b), in which they first brought the 2007 Resolutions to the court's attention, I would not reach the issue of whether the 2007 Resolutions evince a religious

or secular purpose for the Foundations Displays. In light of the Supreme Court's cautioning that the counties' past actions need not "forever taint any effort on their part to deal with the subject matter," *McCreary County v. ACLU,* 545 U.S. 844, 873-74, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005), I would leave this issue to the district court in the first instance. *See Jordon v. Gilligan,* 500 F.2d 701, 707 (6th Cir.1974) (noting that appellate court dicta has persuasive precedential effect only).

DISSENT

RYAN, Circuit Judge, dissenting.

This appeal is essentially a rerun of what the parties argued and our panel majority decided in *ACLU v. McCreary County,* 354 F.3d 438 (6th Cir.2003) (*McCreary III*), and the Supreme Court affirmed in *McCreary County v. ACLU,* 545 U.S. 844, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) (*McCreary IV*). The only real difference is that this appeal presents the question whether the defendants have "purged" the "Foundations of Law and Government Displays" of the religious "taint" of the Ten Commandments. My colleagues think they have not. I think they could not because there was no "taint" to be "purged," and even if there were, the defendants' effort to do so has been disqualified as a mere "litigating position."

The merits and demerits of the vitally important First Amendment Establishment Clause issues that are at the heart of this case were thoroughly discussed in Judge Clay's opinion for the panel and my dissenting opinion in *McCreary III*, and in Justice Souter's opinion for the Supreme Court and Justice Scalia's dissent in *McCreary IV*.

My colleagues have deftly foreclosed consideration of the issue whether the counties' 2007 resolutions expressly disclaiming any intention to endorse religion may have "purged the taint" of religion from the third set of displays with the dismissive observation that the 2007 resolutions were "adopted only as a litigating position." With that nearly Clausewitz-perfect blocking action, I am left with nothing to add to what I wrote in *McCreary III*, except the following:

1. I humbly associate myself with Justice Scalia's powerful and logically compelling explanation in *McCreary IV* that the displays in question do not violate the First Amendment and never did.

2. I cannot be too critical of my panel colleagues who feel stare decisis bound by the Supreme Court majority's persistent hostility to religion and its refusal to acknowledge the historical

evidence that religion, religious symbols, and the support of religious devotion were of the very essence of the values the Constitution's authors and the ratifying legislators thought they were preserving in the language of the First Amendment.

The result, I fear, is that federal courts will continue to close the Public Square to the display of religious symbols as fundamental as the Ten Commandments, at least until the Supreme Court rediscovers the history and meaning of the words of the religion clauses of the First Amendment and jettisons the flawed reasoning of *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

3. Perhaps the panel's decision in this case, taken together with this court's decisions in *ACLU v. Mercer County,* 432 F.3d 624 (6th Cir.2005), and *ACLU v. Grayson County,* 591 F.3d 837 (6th Cir.2010), will move our court to reconsider en banc what my colleagues have held today, from which I strongly dissent. See *McCreary III* and *McCreary IV.*

No. 08-6069
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, ET AL.,

Plaintiffs-Appellees,

v.

MCCREARY COUNTY, KENTUCKY, ET AL.,

Defendants-Appellants,

BEFORE: RYAN, CLAY, and GIBBONS, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and

decision of the case. Accordingly, the petition is denied. Judge Ryan would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

Eastern District of
Kentucky
FILED
08/04/08
At London
Leslie G Whitmer

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

CIVIL ACTION NO. 99-507

AMERICAN CIVIL LIBERTIES UNION

OF KENTUCKY, et al.,

PLAINTIFFS,

V.

MCCREARY COUNTY, KENTUCKY, et al.,

DEFENDANTS,

* * * * * * * * * * * * * * * * *

MEMORANDUM OPINION AND ORDER

This matter is before the court on the plaintiffs' motion (DE 155) to alter or amend

the court's memorandum opinion and order of September 28, 2007; the defendants' renewed motion for summary judgment (DE 159); and the plaintiffs' motion to strike the defendants' renewed motion for summary judgment (DE 164). The court, having reviewed the record and being otherwise sufficiently advised, will grant the plaintiffs' motion to alter or amend judgment, deny the plaintiffs' motion to strike, and direct that the plaintiffs respond to the defendants' motion, which the court will construe as a motion for relief from a final judgment.

I. Factual Background and Procedural History

In 1999, McCreary County and Pulaski County, Kentucky, each posted a copy of the Ten Commandments in their respective courthouses.[1] Various County orders and ceremonies surrounded the mounting of these initial displays. The American Civil Liberties Union of Kentucky, et al. ("ACLU") brought this action and sought a preliminary injunction requiring removal of the displays based on alleged violations of the Establishment Clause of the First Amendment

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[1] The Ten Commandments were also posted in the Harlan County Schools.

to the United States Constitution. Prior to the resolution of the request for an injunction, the Counties altered their displays and passed resolutions authorizing those new displays. The new displays included documents other than the Ten Commandments, but the additional documents were largely religious in nature.[2] The resolutions authorizing the second displays included language emphasizing the importance of religion. Following the posting of the second

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[2] "Speci fically, the Courthouse Displays were modified to consist of: (1) [the 'endowed by the Creator' passage] from the Declaration of Independence; (2) the Preamble to the Constitution of Kentucky; (3) the national motto of 'In God We Trust'; (4) a page from the Congressional Record . . . declaring it the Year of the Bible and including a copy of the Ten Commandments; (5) a proclamation by President Abraham Lincoln designating April 30, 1863 a National Day of Prayer and Humiliation; (6) an excerpt from President Lincoln's 'Reply to Loyal Colored People of Baltimore upon Presentation of a Bible' reading, 'The Bible is the best gift God has ever given to man.'; (7) a proclamation by President Ronald Reagan marking 1983 the Year of the Bible; (8) the Mayflower Compact." *McCreary County*, 354 F.3d at 442.

displays, this court granted the plaintiffs' motion for a preliminary injunction against the second displays and ordered removal of the displays.

The Counties complied with the injunction by removing the second displays, but then posted new displays. Prior to posting these third displays, the Counties hired new lawyers and voluntarily dismissed an appeal from the initial preliminary injunction. The third displays consisted of nine documents of equal size, including a copy of the Ten Commandments, and explanatory phrases to accompany each of the documents.[3] The Collection of documents in the third displays is referred to as "The Foundations of American Law and Government Display" (hereinafter "Foundations Display").[4] At The time the third

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[3] In addition to the Ten Commandments, the third displays included: the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice.

[4] The Purpose of the Foundations Display was stated in the explanatory phrases accompanying its documents. The explanatory statement for the Ten Commandments reads:

displays were erected, the Counties did not repeal the resolutions that authorized the second displays or pass new resolutions authorizing the third displays. This court, acting upon a motion by the ACLU, expanded the preliminary injunction to include the third displays, and then the defendants appealed.

The Sixth Circuit Court of Appeals upheld the preliminary injunction, *McCreary County*, 354 F.3d at 438, whereupon the United States Supreme Court granted the defendant's petition for certiorari. After oral argument, but before the Supreme Court opinion was released, the counties repealed and repudiated

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The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which Declared that "we hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.
McCreary County, 545 U.S. at 856

the resolutions authorizing the second displays.[5] *McCreary County*, 545 U.S. at 881. The Supreme Court, finding an unconstitutional religious motive in the posting of the third (Foundations) displays, saw the Counties' repeals of the 1999 resolutions as "acts of obviously minimal significance in the evolution of the evidence," *McCreary County*, 545 U.S. at 872 n. 19, and affirmed the Sixth Circuit and this court's preliminary injunction. The defendants took no action between the issuance of the Supreme Court opinion and the court's memorandum opinion and order of September 28, 2007, which is under reconsideration here.

On September 28, 2007, this court denied the parties' motions for summary judgment and partial summary judgment and dismissed the plaintiffs' claims against the defendants Harlan County School Districts and Don Musselman in his official capacity as Superintendent of the

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[5] The United States Supreme Court held oral argument on March 2, 2005. On March 8, 2005, and March 10, 2005, McCreary and Pulaski Counties each adopted a resolution that repealed and rescinded the December 1999 resolution relating to the Second displays.

Harlan County Schools with prejudice.[6] The McCreary County and Pulaski County fiscal courts passed new resolutions on October 9, 2007 and October 10, 2007 respectively. The defendants, in their response to the motion to alter or amend judgment and their renewed motion for summary judgment, contend that these October 2007 resolutions "purge the taint" of unconstitutional motive found by the Supreme Court.

II. Motion to Amend or Alter Judgment

A. Legal Standard

Rule 59(e) governs a motion to alter or amend judgment. *Tritent Int'l Corp.* v. *Kentucky*, 395 F. Supp. 2d 521, 523 (E.D. Ky. 2005). The Court will reconsider a ruling under Rule 59(e) if it has committed a legal error; if there has been an intervening change in controlling law; if there is newly discovered evidence; or if necessary to prevent manifest injustice. *GenCorp, Inc.* v. *Am. Int'l Underwriters*, 178F.3d 804, 834 (6th Cir. 1999).

Rule 60(a) provides for corrections based on "a clerical mistake or a mistake

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[6] The court dismissed the claims against the Harlan County Schools and Musselman on the grounds that they had become moot.

arising from oversight or omission whenever one is found in judgment, order, or other part of the record." Rule 60(b) provides for relief from a final judgment, order, or proceeding due to (1) "mistake, inadvertence, surprise, or excusable neglect"; (2) "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by the opposing party"; (4) the judgment being void; and (5) the judgment having been satisfied, released, or discharged" or if "it is based on an earlier judgment that has been reversed or vacated" or if "applying it prospectively is no longer equitable"; or (6) "any other reason that justifies relief." "[R]elief under Rule 60(b) is 'circumscribed by public policy favoring finality of judgments and termination of litigation.'" *Blue Diamond Coal Co.* v. *Trustees of UMWA Combined Ben. Fund*, 249 F.3d 519, 524 (6th Cir. 2001) (quoting *Waifersong Ltd.* v. *Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992)).

B. Dismissal of the Harlan County Action

Though in agreement that the Harlan County action should be dismissed, the parties dispute whether that dismissal should be with prejudice.

"A dismissal for lack of jurisdiction is plainly not a determination of the merits of a claim. Ordinarily such a dismissal is 'without prejudice.'" *Korvettes, Inc.* v. *Galories Anspach, Inc.*, 617 F.2d 1021, 1024 (3d Cir. 1980). *See also Landers* v. *Curran & Connors, Inc.*, 2006 U.S. Dist. Lexis 15770, at *5 (N.D. Cal. 2006). Moreover, "[s]ome cases–mainly involving private plaintiffs as well as private defendants –find that discontinuance has mooted the action; even then it may be noted that a new action can be filed if the conduct should be resumed.'" Wright & Miller, *Federal Practice and Procedure*, § 3533.5 (2d Supp. 2005). *See also id.* (2d Supp. 2007) ("[C]laims of mootness may be rejected more readily in an action to protect broad public interests rather than specific private interests."). In *Washegesic* v. *Bloomingdale Public Schools*, 33 F.3d 679 (6th Cir. 1994), an Establishment Clause challenge to the hanging of a portrait of Jesus Christ in a public school was not dismissed as moot even though the plaintiff had graduated "because the portrait does not affect students only – it potentially affects any member of the public who attends an event at the school." *Id.* at 683; *see also id.* at 682 ("The relevant inquiry in this case is similar to that in any 'public facility' case: whether the individual plaintiff uses the facility and suffers actual injury."). Consequently, the court will alter its previous judgment and dismiss the Harlan county action

without prejudice because Jan Doe's case is not moot, in that it affects any member of the public, not just the plaintiff, and because there is no certainty that the prohibited conduct would not be resumed.

C. The Second Displays

The plaintiffs contend that it was not appropriate for the court to decline to invalidate the second displays on the grounds that they "are no longer involved in the case" and that instead the court should have made its first preliminary injunction, which enjoined the second displays, permanent. Specifically, the plaintiffs contend that the court implicitly and improperly concluded that the displays were moot in dismissing the plaintiffs' challenge, while the defendants contend the judgment should not be altered as to these displays because the issue it moot.

"A plaintiff's voluntary cessation of allegedly unlawful conduct does not suffice to moot a case," *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC) Inc.*, 528 U.S. 167, 174 (200), and "[t]he heavy burden of persua[ding] the court that the challenged conduct cannot reasonable be expected to start up again lies with the party asserting mootness." *Akers* v. *McGinnis*, 352 F.3d 1030, 1035 (6th Cir. 2003).

In a case regarding a display in Garrard County identical to the second displays at issue in this case, the court stated as follows:

> Because there is nothing to stop Garrard County from erecting the 1999 Display again at any point in time, a live controversy still exists. Further, the county continues to maintain a display that includes the Ten Commandments, and it is this to which the plaintiffs object. Because the Ten Commandments continue to be part of the current display, the plaintiffs' objections and offense are presumed to continue.

ACLU v. *Garrard County, Kentucky*, 517 F. Supp. 2d 925, 940 (E.D. Ky. 2007). Earlier in their case, the defendants in *Garrard County* had removed their version of the second displays and replaced it with a version of the Foundations Displays while a motion for a preliminary injunction was under consideration, and the second displays were never temporarily enjoined. *Id.* at 928-29. Moreover, courts regularly decline to declare a challenge to discretionary conduct moot despite significantly changed circumstances. *See, e.g.*, *Akers* v. *McGinnis*, 352 F.3d 1030, 1035 (6th Cir. 2003) (finding challenge to discretion of the MDOC [and] there is no guarantee that MDOC

will not change back to its older, stricter Rule as soon as this action terminates"); *Amnex, Inc.* v. *Cox*, 351 F.3d 697, 704 (6th Cir. 2003) (In dismissing an action against the Michigan Attorney general as moot after he withdrew his notice of intended action, "it was not proper for the district court to rely on the mootness doctrine, inasmuch as the Attorney General's withdrawal did not make it absolutely clear that the allegedly wrongful conduct could not be reasonably expected to recur."); *Cam I, Inc.* v. *Louisville/Jefferson County Metro Gov't*, 460 F.3d 717, 719-20 (6th Cir. 2006) ("[A] controversy does not cease to exist by mere virtue of a change in the applicable law. . . . In other words, where the changes in the law arguably do not remove the harm or threatened harm underlying the dispute, the case remains alive and suitable for judicial determination." (Internal quotation marks and citations omitted.)) In light of this judicial precedent, there is no guarantee that the second displays will not be posted again. Therefore, pursuant to Rule 59(e), the court will alter its judgment that the controversy over the second display is moot, to correct a legal error and prevent manifest injustice.

Regarding the substance of the second displays, the defendants do not question the court's finding that the second displays, the defendants do not question the court's finding that the second displays are unconstitutional

(DE153, 9). Consequently, the court is compelled to alter its judgment under Rule 59(e), declare the second displays unconstitutional, and enter a permanent injunction against the second displays.

D. The First Displays

For the sake of clarity and completeness, the court will also declare unconstitutional and permanently enjoin the first displays, even though they were removed and replaced by the second displays before the court issued its preliminary injunction against the second displays. All that is said above with regard to the second displays pertains with equal force to the first displays.

E. The Third Displays

The plaintiffs contend that the court should make permanent its preliminary injunction enjoining the third displays because the court found that the conduct of the defendants "is unlawful on the undisputed facts" and, therefore, the plaintiffs "are entitled to prevail under Rule 56" (DE 155, 4).

Regarding the Foundations Displays that McCreary County and Pulaski County propose to post, this court found that "[t]he only remaining issue is whether the defendants have taken actions since the Supreme court decision that demonstrate a predominantly

secular purpose for posting the Foundations Displays and that are sufficient to purge the taint of their impermissible religious purpose" (DE 153, 13). After finding the taint had not been purged, the court denied all of the motions for summary judgment because "[n]o triable issues of fact exist for resolution by a jury" (DE 153, 13).

The court will not alter its findings that the displays evidenced an unconstitutional purpose and that this taint had not been purged as of the date of its memorandum opinion and order. The court concluded that it must find the taint had not been purged because "the Supreme Court found the taint inadequately purged" and all of the actions pointed to by the defendants "were taken by the Counties prior to the decision of the Supreme Court and they were not enough to purge the religious taint" (DE 153, 13).

Importantly, the Supreme Court found that "new statement of purpose were presented only as a litigating position, there being no further authorizing action by the Counties' governing boards" and "the sectarian spirit of the common resolution found enhanced expression in the third display, which quotes more the purely religious language of the Commandments." *McCreary County*, 545 U.S. at 871-72. Moreover, the Supreme Court noted that "[f]ollowing argument in this case, in which the

resolutions were discussed, the McCreary and Pulaski County Boards did repeal the resolutions, acts of obviously minimal significance in the evolution of evidence." *Id.* at 872 n.19. Consequently, the court will alter its judgment under Rule 59(e), declare the Foundations Displays at issue in this case unconstitutional because the taint had not been purged as of the date of the court's memorandum opinion and order of September 28, 2007, and permanently enjoin these third displays.

III. The Defendants' Renewed Motion for Summary Judgment and the Plaintiffs' Motion to Strike

As the Supreme Court noted, it is possible that the defendants might purge the taint of unconstitutional purpose and be able to post the third displays. In fact, the defendants contend that they have already done so with their resolutions of October 9-10, 2007. At issue here, however, is the court's memorandum opinion and order of September 28, 2007, which predates the new resolutions. Moreover, the defendants' renewed motion for summary judgment, which was filed on October 30, 2007, is also untimely because the deadline for dispositive motions in this case was November 3, 2006.

Given that the deadline for dispositive motions has passed, but recognizing this court's obligation to review the Counties' new resolutions to determine whether they have purged the taint, the court will construe the defendants' renewed motion for summary judgment as a motion for relief from a final judgment under Rule 60(b) and will deny the plaintiffs' motion to strike. The court will also direct that the plaintiffs respond to the defendants' motion to strike. The court will also direct that the plaintiffs respond to the defendants' motion, with the time for filing their response to run in accordance with the Local Rules from the date of the entry of this order.

Conclusion

Accordingly,

IT IS ORDERED that the plaintiffs' motion to alter or amend judgment (DE 153) is **GRANTED.**

IT IS FURTHER ORDERED that the dismissal of the Harlan County case is **WITHOUT PREJUDICE.**

IT IS FURTHER ORDERED that the first displays are **DECLARED UNCONSTITUTIONAL** and are **ENJOINED.**

IT IS FURTHER ORDERED that the second displays are **DECLARED UNCONSTITUTIONAL** and are **ENJOINED.**

IT IS FURTHER ORDERED that the third displays are **DECLARED UNCONSTITUTIONAL** and are **ENJOINED.**

IT IS FURTHER ORDERED that the plaintiffs' motion to strike (DE 164) is **DENIED.**

IT IS FURTHER ORDERED that the plaintiffs shall respond to the defendants' renewed motion for summary judgment (DE 159), which the court will construe as a motion for relief from a final judgment, with the time for the filing of the response to run in accordance with the Local Rules, beginning from the date of entry of this order. The time for the defendants to file a reply brief if desired, shall also run in accordance with the Local Rules.

There being no just cause for delay, this order is **FINAL** and **APPEALABLE**.

This matter shall be **STRICKEN** from the active docket because the only remaining issue in this matter is the defendants' motion for relief from a final judgment, which is a post-judgment motion.

Signed on August 4, 2008

/s/ Jennifer B. Coffman, Chief Judge

United States District Court

Eastern District of Kentucky

United States District Court,

E.D. Kentucky,

Southern Division,

London.

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, et al., Plaintiffs,

v.

McCREARY COUNTY, KENTUCKY, et al., Defendants.

Civil Action No. 99-507-JBC.

Sept. 28, 2007.

MEMORANDUM OPINION AND ORDER

JENNIFER B. COFFMAN, U.S. District Judge.

This matter is before the court on the defendants' motion for summary judgment (DE 116) and the plaintiffs' motions for summary judgment (DE 132) and partial summary judgment (DE 134). The court, having reviewed the record and being otherwise advised, will deny the motions.

I. Factual Background and Procedural History

Because the facts in this case have been dis-cussed numerous times, see *McCreary County v. ACLU*, 545 U.S. 844, 851-58 (2005); *ACLU v. Mercer County*, 432 F.3d 624, 628-31 (6th Cir.2005); *ACLU v. McCreary County*, 354 F.3d 438, 440-44 (6th Cir.2003); *ACLU v. McCreary County*, 145 F.Supp.2d 845, 846-47 (E.D.Ky.2001), the court will only briefly sum-marize the factual and procedural history.

In 1999, McCreary County and Pulaski County, Kentucky, each posted a copy of the Ten Com-mandments in their respective courthouses. Various county orders and ceremonies sur-rounded the mounting of these initial displays. The American Civil Liberties Union of Kentucky, et al. ("ACLU") brought this action and sought a preliminary injunction requiring removal of the displays based on alleged violations of the Establishment Clause of the U.S. Constitution. Prior to the resolution of the request for an injunction, the Counties altered their displays and passed resolutions authorizing those new displays. The new displays included documents other than the Ten Commandments, but the additional documents were largely religious in nature.[1]

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[1] "Specifically, the Courthouse displays were modified to consist of: (1) [the 'endowed by the Creator' passage] from the Declaration of Independence; (2) the Preamble to the Constitution of Kentucky; (3) the national

The resolutions authorizing the second displays included language emphasizing the importance of religion. Following the posting of the second displays, this court granted the plaintiffs' motion for a preliminary injunction and ordered that the displays be removed.

The Counties complied with the injunction by removing the displays, but then posted new displays. Prior to posting these third displays, the Counties hired new lawyers and voluntarily dismissed an appeal from the initial preliminary injunction. The third displays consisted of nine documents of equal size.

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motto of 'In God We Trust'; (4) a page from the Congressional Record ... declaring it the Year of the Bible and including a copy of the Ten Commandments; (5) a proclamation by President Abraham Lincoln designating April 30, 1863 a National Day of Prayer and Humiliation; (6) an excerpt from President Lincoln's 'Reply to Loyal Colored People of Baltimore upon Presentation of a Bible' reading, 'The Bible is the best gift God has ever given to man.'; (7) a proclamation by President Ronald Reagan marking 1983 the Year of the Bible; (8) the Mayflower Compact ." *McCreary County*, 354 F.3d at 442.

Including a copy of the Ten Commandments, and explanatory phrases to accompany each of the documents.[2] The collection of documents in the third displays is referred to as "The Foundations of American Law and Government Display" (hereinafter "Foundations Displays").[3]

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[2] In addition to the Ten Command·ments, the third displays included: the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice.

[3] The purpose of the Foundations Displays was stated in the explanatory phrases accompanying its documents. The explanatory statement for the Ten Commandments reads:

"The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.' The Ten Commandments provide the moral background of the

At the time the third displays were erected, the Counties did not repeal the resolutions that authorized the second displays or pass new resolutions authorizing the third displays. This court, acting upon a motion by the ACLU, expanded the preliminary injunction to include the third displays, and then the defendants appealed.

The Sixth Circuit Court of Appeals upheld the preliminary injunction, *McCreary County*, 354 F.3d at 438, whereupon the United States Supreme Court granted the defendants' petition for certiorari. After oral argument, but before the Supreme Court opinion was released, the Counties repealed and repudiated the resolutions authorizing the second displays.[4] *McCreary County*, 545 U.S. at 881. The Supreme Court saw the Counties' repeals of the 1999 resolutions as "acts of obviously

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Declaration of Independence and the foundation of our legal tradition."

McCreary County, 545 U.S. at 856.

[4] Oral arguments were held on March 2, 2005 before the United States Supreme Court. On March 8, 2005, and March 10, 2005, McCreary and Pulaski Counties, respectively, each adopted a resolution that repealed and rescinded the December 1999 resolution relating to the second displays.

minimal significance in the evolution of the evidence," *McCreary County*, 545 U.S. at 872 n. 19, and affirmed the Sixth Circuit and this court's preliminary injunction. The defendants have taken no action since the Supreme Court issued its opinion.

II. Standard of Review

A. Summary Judgment Standard

Summary judgment is appropriate only when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The moving party's burden can be satisfied by demonstrating that there is an absence of evidence to support the non-moving party's case. *Id.* at 324-25. To survive summary judgment, the non-moving party must come forward with evidence on which the jury could reasonably find in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The non-moving party must present more than a mere scintilla of evidence to defeat a motion for summary judgment. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir.1989); Fed.R.Civ.P. 56(e). The court must view all of the evidence in the light most favorable to the party opposing summary judgment. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

B. Permanent Injunction Standard

In general, "[t]he standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 546 n. 12 (1987) (citing *Univ. of Texas v. Camenisch*, 451 U.S. 390, 392 (1981)). In the context of the present case, a permanent injunction Is appropriate only if a party can establish that it suffered a constitutional violation from which it will suffer continuing and irreparable injury for which no adequate remedy at law exists. *E.g., Women's Med. Prof'l Com. v. Baird,* 438 F.3d 595, 602 (6th Cir.2006); *see also Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir.1998) (holding that "[w]here the plaintiff establishes a constitutional violation after a trial on the merits, the plaintiff will be entitled to permanent injunctive relief' after showing "1) a continuing irreparable injury if the court fails to issue the injunction, and 2) the lack of an adequate remedy at law").

III. Legal Analysis

The plaintiffs request that the court make permanent the preliminary injunctions issued against McCreary and Pulaski

Counties.[5] The plaintiffs' motion for partial summary judgment seeks to make permanent the court's first preliminary injunction which enjoined the second displays, and their motion for summary judgment seeks to make the court's supple-mental preliminary injunction permanent. The defendants, in turn, argue that the plaintiffs' challenges to the second displays are moot, and that a permanent injunction would be inappropriate.[6] As discussed below, the court will deny all of the motions because none of the parties are entitled to judgment as a matter of law at this time and further because the second displays are no longer involved in the case.

A. The Establishment Clause and the "Purpose" Analysis

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[5] Initially this case involved the Harlan County Schools as well. Because the claims against the Harlan County Schools have become moot, the court will dismiss those claims.

[6] The defendants also raise the argument that the plaintiffs lack standing. This court, the Sixth Circuit, and the Supreme Court have previously reached the merits of the case, however, so the court will not now consider the issue of standing.

Government action violates the Establishment Clause if the action does not have "a secular legislative purpose." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The government must maintain religious neutrality and is clearly not doing so when it "acts with the ostensible and predominant purpose of advancing religion ...." *McCreary County*, 545 U.S. at 860. In determining whether there is a violation of the Establishment Clause, courts may look to the acting party's purpose, and that "purpose" analysis "may be dispositive of the constitutional enquiry...." *McCreary County*, 545 U.S. at 850-51.

The secular purpose advanced by the government actors must be more than a "trivial rationalization." *Id.* at 859. "[A]lthough a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *Id.* at 864 (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)); *see also id.* at 865 n. 11 ("a secular purpose must be serious to be sufficient").

When "scrutinizing purpose," the court looks to official actions and "openly available data" to determine whether the government's objectives are religious. *Id.* at 862-63 ("official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a

drafter's heart of hearts"). The "purpose" analysis should take into account the evolution and development of the displays at issue. *Id.* The court cannot ignore the history of the religious government action, including the progression of the contested displays. *Id.* at 859.

1. The Context of the Government Action

Whether the government's purpose is to advance religion is measured by an "objective observer" standard. The objective observer is presumed to take into account the "text, legislative history, and implementation" of the government action. McCreary County, 545 U.S. at 862 (quoting *Santa Fe*, 530 U.S. at 308). The objective observer has knowledge of not only the most recent events surrounding a government action, but also any previous events, history, and background. As the standard by which purpose is determined, the objective observer is "presumed to be familiar with the history of the government's actions and competent to learn what history has to show." *Id.* at 866. In response to the defendants' argument that purpose should be determined based on the most recent events rather than the entire series of events, the Supreme Court specifically noted that "the world is not made brand new every morning." *Id.* (noting that "reasonable observers have reasonable memories").

Since context matters when a court determines whether government action constitutes a violation of the Constitution, the court's decision may be altered by factors other than the action itself. Thus, government action, such as posting the Foundations Displays, may be found constitutional in one situation and yet unconstitutional if done under different circumstances in a separate instance. The Supreme Court acknowledged that "it will be the rare case in which one of two identical displays violates the purpose prong" but also states, "where one display has a history manifesting sectarian purpose that the other lacks, it is appropriate that they be treated differently...." *Id.* at 866 n. 14. The intent of the government action has a bearing on its constitutionality, and the court may consider the context surrounding the action when determining the underlying purpose. *See id.* ("[I]t will matter to objective observers whether posting the Commandments follows on the heels of displays motivated by sectarianism, or whether it lacks a history demonstrating that purpose.").

When a display identical to the Foundations Displays at issue here was posted in Mercer County, Kentucky, the trial court found no constitutional violation. Upholding that decision, the Sixth Circuit found that Mercer County's stated purpose, which was to recognize American legal traditions, was

supported by the context and was predominantly secular.[7] *Mercer County*, 432 F.3d at 627, 632. In *Mercer County*, only one display had been created and one county action had been taken, both of which occurred after a county resident's request to erect the Foundations Displays. That same resident actually paid for and hung the displays himself. There were no prior unconstitutional displays in the county to taint the context and history as viewed by an objective observer. The Sixth Circuit found that "[a] reasonable observer would not view this display as an attempt by Mercer County to establish religion...." *Id.* at 632.

Mercer County and the instant case involve identical government action which is

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[7] "[T]he purpose for erecting the 'Foundations' display was that 'all of the documents, including the Ten Commandments, have played a role in the formation of our system of law and government.... [The] display is not intended [to], nor does it, endorse or promote religion. It simply acknowledges our history.' " *Mercer County*, 432 F.3d at 627, 632 (quoting Affidavit of Mercer County Judge Executive Charles H. McGinnis).

constitutional in one instance but unconstitutional in the other. As the defendants acknowledge in their motion, "[t]he Supreme Court in this case held that the first two displays evidenced a predominantly religious purpose." DE 117 at 10 (citing *McCreary County*, 545 U.S. at 844). The Supreme Court additionally found that the Counties' purpose did not change with the posting of the third displays. *McCreary County*, 545 U.S. at 873. In McCreary and Pulaski Counties, the objective observer would be aware of the history of the displays and thus would have knowledge of the impermissible purpose. In Mercer County, the objective observer sees no such taint. The content of the displays, without consideration of its context, is thus not dispositive.

2. Purging the Taint of the impermissible Purpose

Although the Supreme Court found that the Counties in this matter had an impermissible purpose that made their actions unconstitutional and that this purpose continued even with the third displays, and even after the second-display resolutions were repudiated, the Court also found "that the Counties' past actions [do not] forever taint any effort on their part to deal with the subject matter." *McCreary County*, 545 U.S. at 873-74. Since it is possible to purge the taint of the

impermissible religious purpose, it necessarily follows that the injury from the constitutional violation is not "continuing" as required by the standard for a permanent injunction. *See Mercer County*, 432 F.3d at 633 ("The [*McCreary County*] majority narrowly tailored its opinion to the facts as they existed at the time of appeal, even to the point of leaving open the possibility on remand of the district court's lifting the preliminary injunction and denying permanent relief." (citing *McCreary County*, 545 U.S. at 873-74)); see also *ACLU v. Rutherford County*, No. 3:02-CV-0396, 2006 WL 2645198, at *10 (M.D.Tenn. Sept. 14, 2006) ("Combined, *McCreary County* and *Mercer County* teach that (1) a public body may post the Ten Commandments in a public building if the display's purpose is secular and the display does not have the primary purpose of advancing or endorsing religion, and, (2) most pertinent to the issues at hand, even if the same public body previously attempted to post the Ten Commandments in an unconstitutional manner, it may be able to post the Ten Commandments in the future in a constitutionally permissible manner."). If the Counties take sufficient actions that purge the taint of their impermissible religious purpose, then the injury claimed by the plaintiffs will no longer exist and the injunction could be

removed.[8] Therefore, the court will deny the plaintiffs' motion for summary judgment, which seeks to permanently enjoin the third displays, because they are not entitled to a permanent injunction as a matter of law.[9]

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[8] A district court in Tennessee denied a permanent injunction in a similar case, stating, "Plaintiffs' request is too broad because it forbids the posting of the Ten Commandments in public buildings in Rutherford County from now until eternity. Plaintiffs have not demonstrated that they will suffer irreparable harm if the Court does not permanently enjoin the display because Plaintiffs have not proven that the constitutional violation found by this Court will be ongoing in the future." *ACLU v. Rutherford County,* No. 3:02-CV-0396, 2006 WL 2645198, at *11 (M.D.Tenn. Sept. 14, 2006).

[9] The plaintiffs' motion for partial summary judgment is moot because it seeks to permanently enjoin the second set of displays, which no longer constitutes an ongoing controversy between the parties. The court may adjudicate only ongoing controversies, and an issue be-comes moot when the claims presented have been satisfied or are no longer active, or when the parties lack an interest in the outcome of the case. *See Chirco v. Gateway Oaks, LLC,* 384 F.3d 307, 309 (6th Cir.2004)

Turning from the plaintiffs' motion to the defendants' motion, this court must reject the claim that the Counties' actions taken to date have purged the taint of an impermissible religious purpose. The defendants have taken no action since repealing and repudiating the resolutions which accompanied the second displays–renunciations which the Supreme Court rejected as "acts of obviously minimal significance in the evolution of the evidence," *McCreary County*, 545 U.S. at 872 n. 19, and a "litigating position." *Id*. at 848.

If defendants' past actions are insufficient to purge the taint, what will suffice? To constitutionally post the Foundations Displays, the Counties in the present action "must show that they have purged themselves of their original sectarian purpose relating to the posting of the Ten Commandments." *Rutherford County*, 2006 WL 2645198, at *10. The Counties will have purged the taint only after there are " 'genuine changes in constitutionally significant conditions/"

(citing *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). The defendants have disavowed any intent to reinstate the second displays. See DE 136 at 1; DE 117 at 15.

which could include a demonstration of "a predominantly secular purpose." *Id.* (citing *McCreary County*, 545 U.S. at 874, and *Mercer County*, 432 F.3d at 632-33).

When presented with such a genuine change, "district courts are fully capable of adjusting preliminary relief to take account of genuine changes in constitutionally significant conditions." *McCreary County*, 545 U.S. at 874 (citing *Ashcroft v. ACLU*, 542 U.S. 656 (2004)). Moreover, "the district court should be willing to modify its judgment should the counties later demonstrate a predominantly secular purpose." *Mercer County*, 432 F.3d 624, 632 n. 6 (citing *McCreary County*, 545 U.S. at 873-74).

This court will modify its judgment when the "counties later demonstrate a predominantly secular purpose," *id.*, but they have not yet done so. The Supreme Court reviewed the history of the displays-including repeal and repudiation of the resolutions accompanying the second displays–and found that "[n]o reasonable observer could swallow the claim that the Counties had cast off the objective so unmistakable in the earlier displays." *McCreary County*, 545 U.S. at 872. The Counties claim to "have done every-thing they can to distance themselves from the second display, including changing counsel, changing the display, and eventually repealing the December, 1999, Resolution." DE 117 at 3.

Yet, all of those actions were taken by the Counties prior to the decision of the Supreme Court and they were not enough to purge the religious taint. If the Supreme Court found the taint inadequately purged, so must this court.

Therefore, the court will deny the defendants' motion for summary judgment because they are not entitled to judgment as a matter of law.

B. Resolution of This Case

Although it is possible to constitutionally post the Ten Commandments, the defendants' actions were unconstitutional and remain so until they have purged the taint of their impermissible religious purpose.

A trial in this matter would be unavailing. No triable issues of fact exist for resolution by a jury. The only remaining issue is whether the defendants have taken actions since the Supreme Court decision that demonstrate a pre-dominantly secular purpose for posting the Foundations Displays and that are sufficient to purge the taint of their impermissible religious purpose. Thus, as a matter of law, neither the defendants nor the plaintiffs are entitled to summary judgment.

Accordingly,

IT IS ORDERED that the parties' motions for summary judgment or partial summary judgment (DE 116, 132, 134) are **DENIED.**

IT IS FURTHER ORDERED that the plaintiffs' claims against the defendants Harlan County School District and Don Musselman are **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED that this matter is referred to U.S. Magistrate Judge James B. Todd for the purpose of conducting a settlement conference, which is scheduled for October 22, 2007, at 9:00 a.m. in Lexington.

[McCREARY COUNTY, KENTUCKY SEAL]

BLAINE PHILLIPS COUNTY
JUDGE/EXECUTIVE
OFFICE OF THE JUDGE/EXECUTIVE
Fax: (606) 376-9499 TDD: 1-800-247-2510

McCREARY COUNTY
1 NORTH MAIN STREET
P.O. BOX 579
WHITLEY CITY, KENTUCKY 42653
(606) 376-2413

MCCREARY COUNTY FISCAL COURT
RESOLUTION 071009-2

RESOLUTION REGARDING FOUNDATIONS OF AMERICAN LAW & GOVERNMENT DISPLAYS

WHEREFORE, McCreary County displayed certain historical documents on the wall of the McCreary County court house called the "Foundations of American Law and Government" display;

WHEREFORE, since the Foundations of American Law and Government display was originally displayed, elections have taken place in McCreary County which have resulted in the election of a new County Judge/Executive and three new Fiscal Court members, and only one

of the Fiscal Court members currently serving was a part of the original decision to display the Foundations of American Law and Government display;

WHEREFORE, the Sixth Circuit Court of Appeals recently found that the Foundations of American Law and Government display was constitutional in a display in the Mercer County court house;

WHEREFORE, the Seventh Circuit Court of Appeals recently held that the Foundations of American Law and Government display was constitutional in the court house in Elkhart County, Indiana;

WHEREFORE, the United States District Court for the Eastern District of Kentucky recently held that the Foundations of American Law and Government was constitutional in a display in Rowan County, Kentucky;

WHEREFORE, McCreary County desires to display the Foundations of Law and Government display in its entirety in the McCreary County court house;

WHEREFORE, McCreary County firmly believes in educating its citizens regarding the history of the County, the State of Kentucky and the United States of America;

WHEREFORE, The Foundations of American Law and Government display contains some of the documents and symbols that displayed an important role in the foundation and development of the system of law and government of the United States, the State of Kentucky and McCreary County;

WHEREFORE, McCreary County wishes to clarify and restate its purpose to display the Foundations of Law and Government display;

WHEREFORE, the purpose to display the Foundations of American Law and Government display is to educate the citizens of McCreary County on some of the documents and symbols that played an important role in the foundations, development and history of McCreary County, the State of Kentucky and the United States of America;

WHEREFORE, McCreary County wishes to expressly state that it does not have a religious motivation for its desire to continue to display the Foundations of American Law and Government display;

THEREFORE BE IT RESOLVED that the purpose of McCreary County in desiring to display the Foundations of American Law and government display is educational and

historical, to educate the citizens of McCreary County about some of the historical documents and symbols that played a role in the foundation and development of the system of law and government in McCreary County, the State of Kentucky and the United States of America;

BE IT FURTHER RESOLVED that McCreary County expressly disclaims any purpose to endorse religion in its desire to display the Foundations of American Law and Government display and expressly repeals, repudiates and disavows any public statements or testimony that may be mistakenly construed to the contrary;

BE IT FURTHER RESOLVED that this Resolution and the Resolution passed by the McCreary County Fiscal Court on March 8, 2005, shall be and hereby are the only statements of the purpose of the Foundations of American Law and Government display. Should there be any other statements, official or otherwise, from this body or any other governmental official of McCreary County, that claim to state the purpose of the Foundations of American Law and Government display, they are herby overruled, superceded, repealed and replaced by this Resolution.

DONE at the City of Whitely City, County of McCreary, Commonwealth of Kentucky, on this 9th day of October 2007, in witness whereof we have hereunto set our hands.

/s/ Blaine Phillips
Judge/Executive of McCreary County

/s/ Judy Redden
Magistrate of McCreary County

/s/ Teddy Coffey
Magistrate of McCreary County

/s/ Roger Phillips
Magistrate of McCreary County

_____
Magistrate of McCreary County

RESOLUTION REGARDING DISPLAY OF HISTORICAL DOCUMENTS

WHEREAS, in October, 2000, the Pulaski County Fiscal Court authorized the display of a grouping of historical documents called the Foundations of American Law & Government display;

WHEREAS, federal courts in Kentucky and Indiana have stated and held that the Foundations of American Law & Government display is constitutional;

WHEREAS, Pulaski County has a desire to display the Foundations of American Law & Government display in its entirety, including all the documents in the display;

WHEREAS, on March 10, 2005, the Pulaski County Fiscal Court adopted a Resolution clarifying and restating the purpose if the Foundations of Law & Government display;

WHEREAS, Pulaski County has had intervening elections since the time the Foundations of Law & Government display was first authorized by the Pulaski County Fiscal Court and since the March 10, 2005, Resolution was passed;

WHEREAS, the intervening elections have resulted in the election of a new County Judge Executive and four new magistrates to the Fiscal Court;

WHEREAS, only one magistrate currently on the Pulaski County Fiscal Court participated in the decision to authorize the Foundations of American Law & Government display;

WHEREAS, it has become necessary for Pulaski County to restate its purpose for its desire to display the Foundations of American Law & Government display;

WHEREAS, Pulaski County desires to educate the citizens of Pulaski County about some of the important and historical documents, symbols and other items that have factored into the formation and continuance of the American system of law and government;

WHEREAS, the Pulaski County Fiscal Court believes that the Foundations of Law & Government display accomplishes this historical and educational purpose;

WHEREAS, the only purpose of the County in desiring to display the Foundations of American Law & Government display in its entirety us educational and historical;

WHEREAS, Pulaski County rejects any intention or motivation or purpose to endorse religion by displaying the Foundations of American Law & Government display in its entirety;

THEREFORE BE IT RESOLVED that Pulaski County's purpose for desiring to display the Foundations of American Law & Government display is educational and historical, to educate the public about some of the historical documents, symbols and other items that played a role in the foundation and development of the system of law and government in Pulaski County, the State of Kentucky and the United States of America;

BE IT FURTHER RESOLVED that Pulaski County expressly denies any purpose to endorse religion in its desire to display the Foundations of American Law & Government display in its entirety and expressly repeals, repudiates and disavows any public statements or testimony that may be mistakenly construed to the contrary;

BE IT FURTHER RESOLVED that this Resolution and the Resolution passed by the Pulaski County Fiscal Court on March 10, 2005, shall be and hereby stand as the only statements of the purpose of the Foundations of

American Law & Government display. If there are any other statements, official or otherwise, from this body or any other governmental official of Pulaski County, that claim to state the purpose of the Foundations of American Law & Government display, they are herby overruled, superceded, repealed and replaced by this Resolution.

DONE at the city of Somerset, County of McCreary, Commonwealth of Kentucky, on this 9th day of October 2007, in witness whereof we have hereunto set our hands.

/s/ Barty Bullock
Judge/Executive of Pulaski County

/s/ Kenny Isaacs
Magistrate of Pulaski County

/s/ Mike Wilson
Magistrate of Pulaski County

/s/ Tommy Barnett 3rd
Magistrate of Pulaski County

/s/ Glenn H. Maxey 4th
Magistrate of Pulaski County

/s/ Mike Strunk
Magistrate of Pulaski County

Magistrate of Pulaski County

Magistrate of Pulaski County